

In the Merchant Mariner's Document No. Z-433818-D1 and all other Licenses and Documents
Issued to: EARL N.POWELL

DECISION AND FINAL ORDER OF THE COMMANDANT
UNITED STATES COAST GUARD

877

EARL N.POWELL

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations Sec. 137.11-1.

By order dated 18 November 1955, an Examiner of the United States Coast Guard at Boston, Massachusetts, suspended Merchant Mariner's Document No. Z-433818-D1 issued to Earl N. Powell upon finding him guilty of misconduct based upon a specification alleging in substance that while serving as Chief Cook on board the American SS ANTIGUA under authority of the document above described, on or about 6 June 1955, while said vessel was in the port of Kingston, Jamaica, he assaulted a fellow crew member, Columbus Julian, with a deadly weapon; to wit, a meat cleaver.

At the hearing, Appellant was given a full explanation of the nature of the proceedings, the rights to which he was entitled and the possible results of the hearing. Appellant was represented by counsel of his own choice and he entered a plea of "not guilty" to the charge and specification proffered against him.

The Investigating Officer made his opening statement. He then introduced in evidence the testimony of the seaman alleged to have been assaulted and the testimony of three other members of the crew. Two of the latter witnessed the incident.

After the Examiner had denied several motions to dismiss, Appellant offered in evidence his sworn testimony. Appellant stated that he had a meat cleave in his hand preparing food when he was attacked by Julian and Rivo; they forced Appellant to retreat to the messroom; the other crew members erroneously thought that Appellant was the aggressor when they saw the cleaver; and Appellant was hospitalized for 9 days.

At the conclusion of the hearing, having heard the arguments of the Investigating Officer and Appellant's counsel and given both parties an opportunity to submit proposed findings and conclusion, the Examiner announced his decision and concluded that the charge and specification had been proved. He then entered the order suspending Appellant's Merchant Mariner's Document No. Z-433818-D1, and all other licenses and documents issued to Appellant by the United States Coast Guard or its predecessor authority, for a

period of four months - one month outright suspension and three months' suspension on probation until eighteen months after the termination of the outright suspension.

Based upon my examination of the record submitted, I hereby make the following

FINDINGS OF FACT

On a voyage including the date of 6 June 1955, Appellant was serving as Chief Cook on board the American SS ANTIGUA and acting authority of his Merchant Mariner's Document No. Z-433818-D1. During the course of the voyage, Appellant was subjected to considerable criticism and harassment by members of the crew, including the Chief Steward, who were attempting to have Appellant removed from the ship.

On 6 June 1955, the ship was in the port of Kingston, Jamaica. At about 1700 on this date, messman Julian entered the galley and told Appellant that the crew was complaining about the food which was being served for the evening meal. There was an argument between the two seamen. As a result of the prior annoying conduct by Julian and other members of the crew, Appellant became angry and approached Julian with a meat cleave (with a blade 8 inches by 10 inches) which Appellant had been using in preparing the meal. Julian was frightened. He ran into the messroom for protection with Appellant in pursuit shouting threats at Julian. Appellant cornered Julian in the messroom and raised the meat cleaver into a position to strike at Julian. The latter grabbed Appellant's arm and managed to deflect the blow with the assistance of other members of the crew. In the meantime, messman Rivo took a fire axe off the bulkhead in the galley and followed the other two seamen into the messroom. Rivo struck Appellant on the back of his head with the flat side of the axe when he again raised the cleaver. Appellant was stunned by the blow. He either dropped the cleaver or it was taken from him by the crew members. Appellant returned to the galley. The Chief Mate was in the galley on the way to the scene of the disturbance. He rendered first aid treatment to Appellant upon observing his bleeding head.

Appellant received a two-inch cut on the back of his head which required four stitches. He was treated by two different physicians, and then was hospitalized at Colon, Panama, on 9 June 1955 for nine days. One of Julian's arms was bruised in the scuffle. Another crew member, an oiler named Torres, received a minor cut on his hand. Torres had been eating his meal when Appellant and Julian ran into the messroom.

There is no record of prior disciplinary action having been taken against Appellant. He has been going to sea on American merchant vessels for approximately 13 years.

BASIS OF APPEAL

This appeal has been taken from the order imposed by the Examiner. Appellant contends that there were radical variances in the testimony of the Investigating Officer's witnesses regarding the exact location where Julian stopped in the messroom; whether Julian was struck by Appellant;

whether Julian fell to the floor or was standing after Appellant's attempted blow with the cleaver; what happened to the fire axe after Rivo struck Appellant with it; how Appellant got rid of the cleaver; and Appellant's general disposition pertaining to his association with members of the crew.

There is evidence that Appellant had been persecuted by Julian and Rivo, who were attempting to get Appellant off the ship, together with Appellant's clear, consistent testimony that he was assaulted by these two seamen. This indicates that Appellant was attacked physically when other means of attempting to remove him had failed. Hence, Appellant was the victim rather than the assailant.

The failure of the Investigating Officer to obtain the testimony of the Chief Steward who was in the galley at the beginning of the incident and the failure to offer the logbook in evidence raised the inference that such evidence would have been unfavorable to the Investigating Officer's case.

This matter could have a lasting effect on Appellant's future. He has been going to sea since 1943 without prior trouble. It is respectfully submitted that the contradictions in the testimony of the Investigating Officer's witnesses and the failure to produce evidence in his possession is sufficient to require dismissal of the charges against Appellant in order to clear his record.

APPEARANCES: Saul Sperling, Esquire, of New York City, of Counsel.

OPINION

The Examiner ably disposed of the variances in portions of the testimony of the Investigating Officer's witnesses by stating that he did not consider the variances significant due to the extreme excitement at the scene of the attack. These discrepancies in testimony pertain only to collateral details insofar as the allegation of assault is concerned. The Examiner specifically rejected Appellant's testimony that Rivo and Julian initially attacked Appellant; and the Examiner accepted the testimony of the three witnesses (Julian, Rivo and Torres) who stated that Julian was chased into the messroom by Appellant with a meat cleaver in his possession. The latter finding of fact was material to the basic issue as to whether Appellant was guilty of assault. The Examiner was in the best position to evaluate the credibility of the witnesses; and he was not required to reject in toto the testimony of the Investigating Officer's witnesses simply because their testimony disagreed on subordinate details. The testimony of the three witnesses agreed in all material respects. The record indicates that Torres was a completely impartial witness.

Since the basic fact has been established that Appellant pursued Julian, there was no element of self-defense involved notwithstanding the prior antagonizing conduct of Julian and other members of the crew. The Examiner recognized the accumulation of incidents as provocation which should be considered as a mitigating circumstance with respect to the order imposed. He also considered the facts that he had a clear record since the beginning of his seaman career in 1943.

Appellant's contention with respect to the Investigating Officer's failure to produce evidence

in his possession is without merit. The presence or absence of the Chief Steward was not exclusively within the control of the Investigating Officer. Appellant had the opportunity to subpoena the Chief Steward to appear as a witness; but Appellant did not do this. In addition, the Investigating Officer stated that the Chief Steward did not appear because he was ill at the time of the hearing. With respect to the logbook, Appellant's counsel examined it but he did not make any request it be submitted in evidence. As stated by the Examiner, the testimony of eyewitnesses is generally more persuasive than entries in an Official Logbook. Ordinarily, such an entry would be made by a Master who did not witness the subject matter of the entry.

Despite the mitigating circumstances which were taken into consideration by the Examiner, it is my opinion that the order imposed is lenient in view of the fact that Appellant was the aggressor in committing an assault with a very dangerous weapon.

ORDER

The order of the Examiner dated at Boston, Massachusetts, on 18 November 1955 is ~~REVERSED~~ **AFFIRMED**.

A. C. Richmond
Vice Admiral, United States Coast Guard
Commandant

Dated at Washington, D. C., this 20th day of April, 1956.